

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission)	
on its own motion)	
)	Docket No. 01-0705
Northern Illinois Gas Company d/b/a NICOR)	
Gas Company)	
)	
Reconciliation of Revenues collected under)	
Gas Adjustment Charges with Actual Costs)	
prudently incurred)	
)	
Illinois Commerce Commission)	
on its own motion)	
)	
)	Docket No. 02-0067
Northern Illinois Gas Company d/b/a NICOR)	
Gas Company)	
)	
Proceeding to review Rider 4, Gas Cost, pursuant)	
to Section 9-244(c) of the Public Utilities Act)	
)	
Illinois Commerce Commission)	
on its own motion)	
)	
)	Docket No. 02-0725
Northern Illinois Gas Company d/b/a NICOR)	
Gas Company)	
)	
Reconciliation of Revenues collected under)	
Gas Adjustment Charges with Actual Costs)	
prudently incurred)	

**THE CITIZENS UTILITY BOARD AND
COOK COUNTY STATE'S ATTORNEY'S OFFICE
REPLY TO NICOR'S RESPONSE TO CCSAO/CUB'S MOTION
TO COMPEL NICOR TO RESPOND
TO CUB'S 11TH SET OF DATA REQUESTS**

The Citizens Utility Board (CUB) and the Cook County State's Attorney's Office (CCSAO) offer this reply to Nicor's Response to CUB/CCSAO's Motion to Compel Nicor to Respond to CUB's 11th Set of Data Requests filed July 18, 2003.

Nicor in its Response offers no new insight as to why it is continuing to refuse to respond to CUB's 11th Set of Data Requests. Nicor concedes that it has failed to respond fully, hiding behind the attorney-client privilege that Nicor itself destroyed by its own handling of the Lassar investigation.

I. No Attorney Relationship Was Created

First, Nicor delayed for over six months before it even claimed any privilege relating to the request. As explained and fully briefed in CUB/CCSAO's renewed motion to compel, which will not be repeated here, the privilege, if it ever existed at all, has been waived by Nicor.¹ As a foundational issue, Nicor Gas, in order to claim any attorney-client privilege, must show that there was in fact an attorney-client relationship. The facts, however, demonstrate there was no attorney-client relationship with either Nicor, Inc. or Nicor Gas. First, Mr. Lassar was not hired to function as an attorney and give legal advice, but rather was hired to conduct an investigation. Second, if Nicor Gas is to be believed, Mr. Lassar was not hired or retained by Nicor Gas, but rather by a third entity, the special board of Nicor, Inc., the holding company. At this fundamental level, Nicor Gas' claim of attorney-client privilege crumbles since there was no attorney-client advice sought nor any relationship at all with Nicor Gas, the entity now seeking to claim the privilege for materials it voluntarily turned over to a third-party.

Nicor argues, on the one hand, that Mr. Lassar was not working for either Nicor Gas or Nicor, Inc., but rather the special committee of the board of directors of Nicor, Inc. Using that fiction, Nicor argues it has no control over Mr. Lassar to require production of any of his materials even though Mr. Lassar is now a witness in these

¹ Under Commission rules, the objection should have been made within 28 days of the filing of the data request.

dockets. On the other hand, by Nicor Gas attempting to define Mr. Lassar's client (not in the legal sense) as the special committee of the board of directors of Nicor Inc., the holding company, it means that Nicor Gas turned over all its attorney-client materials to an outside third party, thereby waiving any privilege, if one existed. Indeed, the lack of controls that Nicor Gas put in place to protect those allegedly confidential materials was sadly admitted by Nicor's in-house counsel in an affidavit filed with its opposition to CUB's request for a subpoena of Russ Strobel. In his affidavit, Daniel McNamara said KPMG "had access to Nicor Gas's e-mail system, downloaded these e-mails, and ultimately produced them." Incredibly, he also said that "Nicor Gas did not know that KPMG had produced these particular e-mails. . ." Mr. McNamara does not seem to get the point. KPMG had the materials for over a year but during that time Nicor Gas took no steps to insure their confidentiality nor did Nicor Gas review the KPMG documents before they were turned over to CUB and the ICC Staff. Only now does Nicor Gas seek to impose an attorney client privilege. As Judge Mikva noted: "We believe that the attorney-client privilege should be available only at the traditional price: a litigant who wishes to assert confidentiality must maintain genuine confidentiality." *Permian Corp. v. United States*, 665 F.2d 1214, 1222 (D.C. Cir. 1981). Even if the turning over of the keys to Nicor Gas's e-mails to a non-attorney, third party was not enough to waive the privilege, (which it was) the lack of controls by Nicor Gas by alleging ignorance of what happened to the materials to maintain confidentiality certainly amounts to a waiver of the privilege.

II. Lassar's Role as Witness Requires Full Disclosure

Moreover, the making by Nicor Gas of Mr. Lassar a witness in this case destroys any remaining privilege. As CUB/CCSAO stated in its renewed motion, when work product is given to a testifying witness, it “either informs the expert as to what counsel believes are relevant facts, or seeks to influence him to render a favorable opinion. [citation omitted.] Thus, requiring disclosure of an attorney’s communications to the expert does not impinge on the goals served by the opinion work product doctrine.” *Karn v. Ingersol-Rand Co.*, 168 F.R.D. 633 (N.D. Ind. 1996). In *People v. Wagener*, 196 Ill.2d 269, 752 N.E.2d 430 (2001), the Illinois Supreme Court found that once a person who received confidential information was designated as an expert witness the attorney-client privilege “was waived in its entirety with respect to all information defendant had shared with the experts, just as it would be by the voluntary revelation of a privileged communication to any person with whom the privilege was not shared.” This is so because Mr. Lassar cannot separate in his mind the material he reviewed in reaching conclusions in his report that were attorney-client confidential and those that were not. By his being a witness, he must rely on the attorney-client documents and he will inevitably disclose the content in his opinions. As a result, CUB/CCSAO is entitled to have access to such documents and information.

III. Nicor Failed to Fully Answer Requests

Nicor argues that it has answered the requests fully. CCSAO/CUB refers the ALJs to Nicor’s answers to the 11th Set of Data Requests that were attached to its renewed motion to compel filed on August 1, 2003. An objective reading of those

answers can only lead to one conclusion—Nicor has failed to answer the questions in good faith and should be compelled to answer them.

Without limitation, CUB/CCSAO offers the following examples of Nicor non-compliance and will be ready at hearing to discuss all requests more fully:

- CUB 11.02. Nicor did not answer the request but merely stated that the Lassar Report contained no such finding. The question related to Sidley’s opinion on the matter, not what it put in the report. Moreover, the request seeks to determine if Lassar evaluated whether any changes were appropriate, not what was included in the Report.
- CUB 11.03. Nicor flatly refuses to provide the materials requested. It has no legitimate basis to withhold the documents.
- CUB 11.04. Again, Nicor flatly refuses to provide the materials.
- CUB 11.05. Nicor flatly refuses to answer the request.
- CUB 11.06. Nicor did not answer subparts c and d.
- CUB 11.07. Nicor has not identified which document by number corresponds to which adjustment.
- CUB 11.09. Nicor objects alleging “speculation” and “outside the scope of the Report and Lassar’s anticipated testimony.” The question does not require speculation and the issues raised by the request are not outside the scope of these dockets. Mr. Lassar may not have included the subject in his Report, but it is the Commission, not Mr. Lassar, that has defined the scope of these dockets. Discovery is required to be answered when the request is reasonably related to the issues and may lead to the discovery of admissible evidence. If the investigators

had an opinion, Nicor cannot hide that opinion merely because Nicor chose not to include it in the Report or Mr. Lassar's testimony.

- CUB 11.10. Again, Nicor refuses to answer. See CUB 11.09 above.
- CUB 11.12. Again, Nicor refuses to answer. See CUB 11.09 above.

The Commission should not sanction non-responsive answers to data requests. Instead, it should compel Nicor to answer the requests fully.

IV. Conclusion

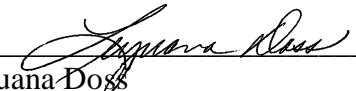
Wherefore, CUB/CCSAO requests that the Commission enter an order requiring Nicor to answer fully CUB's 11th Set of Data Requests, and to provide a privilege log for any documents that Nicor is withholding.

Respectfully Submitted,

CITIZENS UTILITY BOARD

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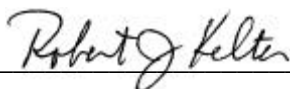
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Dated: 12 August 2003

VERIFICATION

I Robert J. Kelter, Director of Litigation for the Citizens Utility Board, do hereby verify that the statements made in the foregoing Reply are to the best of my knowledge and information and belief, true and correct.



Robert J. Kelter

Notarized this 12th day of August, 2003.



Martin R. Cohen
Notary Public

